reasonable to ask it to make further effort." Pet. 11 (emphasis omitted).

Moreover, contrary to petitioners' contentions (*e.g.*, Pet. 19), neither Section 423(d)(5)(B) nor the regulations impose a mandatory duty to recontact the treating physician in all circumstances. The regulations accord the Commissioner a measure of discretion over the decision to recontact, providing that "[w]e may not seek additional evidence or clarification from a medical source when we know from past experience that the source either cannot or will not provide the necessary findings." 20 C.F.R. 404.1512(e)(2). Indeed, the recontacting provision, 20 C.F.R. 404.1512(e)(1), applies only when, in the judgment of the finder of fact, "the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques."

The lack of an inflexible requirement is also evident in 20 C.F.R. 404.1519h, the provision concerning the use of the treating physician in a consultative examination. That provision provides that "[w]hen in our judgment your treating source is qualified, equipped, and willing to perform the additional examination or tests for the fee schedule payment, and generally furnishes complete and timely reports, your treating source will be the preferred source to do the purchased examination." This language expressly endows the Commissioner with substantial discretion in making a decision that will necessarily differ from case to case depending on the facts; it does not create (as petitioner suggests, *e.g*, Pet. 15) a mandatory requirement that the treating physician be employed for the consultative examination.

Petitioners also err in arguing (Pet. 15) that 20 C.F.R. 404.1527(d)(2) imposes a mandatory duty to make findings on each factor set forth therein when considering what weight to give the opinion of the treating physician. That section specifies factors for the ALJ to consider, but the ultimate duty imposed by the regulation is only that the ALJ "give good reasons" in determining the weight to be accorded to the treating physician's opinion. See 20 C.F.R. 404.1527(d)(2). The sufficiency of the reasons given is obviously fact-bound and will necessarily vary from case to case.[1]

b. In any event, the first question presented by the petition is simply whether the court below erred in concluding that any procedural error committed by SSA in failing to comply with 20 C.F.R. 404.1527(d)(2) was harmless error. Pet. ii. But the court of appeals did not even apply a harmless error analysis to that claim of petitioners; instead, it held that the ALJs had complied with Section 404.1527(d)(2). The court of appeals stated: "we hold that the ALJs did not commit error when declining to afford controlling weight to the treating physi-

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[1] Petitioners appear to assume that 20 C.F.R. 404.1527(d)(2) is an implementation of Section 423(d)(5)(B). That is incorrect. Section 423(d)(5)(B) pertains to evidence gathering. Section 404.1527(d)(2) pertains to how the Commissioner weighs evidence. The two are different. The Senate Finance Committee, in its consideration of the provision that became Section 423(d)(5)(B) (Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 9, 98 Stat. 1804), indicated in its report that it did "not intend to alter in any way the relative weight which the Secretary places on reports received from treating physicians and from consultative examinations." S. Rep. No. 466, 98th Cong., 2d Sess. 26 (1984). The Committee further noted: "Nor is it intended that the Secretary shall be precluded from obtaining consultative examinations when the Secretary finds it necessary to secure additional information or to resolve conflicting evidence." *Ibid.*

cians' opinions." Pet. App. 84. Even assuming the court of appeals' harmless-error holding applies to petitioners' Section 404.1527(d)(2) claim, that factbound decision is correct. Petitioners in this case have not contended, and could not reasonably contend, that the ALJs in these cases did not give "good reasons" for their findings regarding the treating physicians' opinions, including reliance on medical evidence from examining physicians that controverted the opinions of the treating physicians. Pet. App. 47-48 (magistrate judge's recommendations regarding petitioner Fink); *id.* at 73-75 (same as to petitioner Rochester).

To be sure, the court of appeals did apply a harmless error analysis to petitioners' separate contentions (1) that there was error at the prehearing stage because SSA ordered a consultative examination without recontacting the treating physician, 20 C.F.R. 404.1512(e)(1) and (f), and failed to employ the treating physicians for the consultative examinations under Section 404.1519h, and (2) that the ALJs erred in failing to recontact the treating physicians under Section 404.1512(e) and (f). See Pet. App. 83-84. But to the extent the first question presented encompasses those claims, they do not warrant review either. The court of appeals properly concluded that, on the particular facts presented in these two cases, any procedural errors at the prehearing stage were harmless because both petitioners had a subsequent opportunity to present supplemental medical reports from their treating physicians to the ALJs. *Id.* at 84. The court's harmless error analysis was thus case-specific and factbound. Tellingly, petitioners do not assert that the court of appeals' factual assessment was in error or that there was substantial evidence of disability overlooked by the ALJs because of the alleged proce-

dural errors at the initial, pre-ALJ stages of the administrative review process.

For similar reasons, a failure by an ALJ to recontact a treating physician before considering a consultative examination that was ordered at a prehearing stage should not furnish a basis for setting aside the ALJ's decision. The contrary rule petitioners propose would in effect impose an exclusionary rule on ALJ proceedings, requiring the ALJ to ignore probative evidence in the record on the ground that SSA erred in requesting it in the first place. Petitioners cite no authority for such an extraordinary rule in administrative hearings. Because the ALJ conducts a de novo hearing and review based on all the evidence of record, procedural errors committed at the initial, more informal stages of the review process therefore should not ordinarily furnish a basis for challenging the ALJ's decision.

Furthermore, contrary to the contention raised by the second question framed in the petition (Pet. App. ii, 24-25), the court of appeals' holding does not purport to shift the task of obtaining additional information to the claimant. In these cases, additional information in fact *was* submitted by treating physicians to the ALJ. See *id.* at 42, 43-44, 46, 69-70; pp. 3, 4-5, *supra*. Petitioners thus were not prejudiced by the ALJ's alleged failure to request that same information.[2] Petitioners do not claim that there was still more information that could have

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[2] As such, contrary to petitioners' contention (Pet. 24-26), the decision below does not conflict with decisions in the Tenth Circuit suggesting that the ALJ bears the responsibility of seeking additional information, where necessary, from the treating physician. See *Robinson* v. *Barnhart*, 366 F.3d 1078, 1084 (2004); *White* v. *Barnhart*, 287 F.3d 903, 908 (2001).

been obtained if the ALJ had recontacted the treating physicians directly.

2. Petitioners contend (Pet. 6-7) that the court of appeals' holding that any procedural error was harmless conflicts with decisions of other courts of appeals. Petitioners are mistaken.

Only one of the decisions relied upon by petitioners discusses the possible applicability of "harmless error" principles. That decision, *Wilson* v. *Commissioner of Social Security*, 378 F.3d 541 (6th Cir. 2004), is not contrary to the decision below. In *Wilson*, the ALJ had rejected the opinion of the treating physician without articulating any "good reasons" for doing so. *Id.* at 545. Although the Sixth Circuit concluded, on the facts of that case, that the ALJ's failure to provide reasons for rejecting the treating physician's opinion was not "harmless error," *id.* at 546, the Sixth Circuit expressly noted that "[t]hat is not to say that a violation of the procedural requirement of § 1527(d)(2) could never constitute harmless error." *Id.* at 547. Moreover, the Sixth Circuit indicated that one possible example of harmless error could be a situation "where the Commissioner has met the goal of § 1527(d)(2)—the provision of the procedural safeguard of reasons—even though she has not complied with the terms of the regulation." *Ibid.*

That decision is not inconsistent with the decision below. Here, unlike in *Wilson*, the ALJs did provide good reasons for rejecting the treating physicians' opinions. There is nothing in *Wilson* that would preclude the Sixth Circuit from reaching the same conclusion as the Fifth Circuit in this case in the circumstances presented here. See 378 F.3d at 547. In contrast, the government's "harmless error" contention in *Wilson* was

merely that "the ALJ 'could' have relied on evidence in the record." *Id.* at 546.

Moreover, there is good reason to believe that the outcome of *Wilson* would have been the same in the Fifth Circuit as it was in the Sixth. In *Wilson*, the Sixth Circuit relied upon the Fifth Circuit's decision in *Newton*, *supra*, for the proposition that "courts have remanded the Commissioner's decisions when they have failed to articulate 'good reasons' for not crediting the opinion of a treating source, as § 1527(d)(2) requires." *Wilson*, 378 F.3d at 545 (citing *Newton*, 209 F.3d at 456). The decision below did not retreat from *Newton*, but merely distinguished it on the ground that in *Newton*—as was apparently the case in *Wilson* as well—the record did not contain any medical opinion evidence that was based on a personal examination of the claimant other than the opinion of the treating physician.

Petitioners' claim that the decision below conflicts with decisions in other circuits is similarly without merit. Although petitioners do cite cases (*e.g.*, Pet. 6-7) in which other courts of appeals have remanded for reconsideration on the grounds that the ALJ failed to give "good reasons" for rejecting a treating physician's opinion or failed to seek additional information from a treating physician, none of those decisions holds that such a procedural error could never be harmless. Any such rigid rule would be inconsistent with the generally applicable principle of administrative law that a reviewing court should set aside an agency decision only if any errors the court identifies were prejudicial. See, *e.g.*, 5 U.S.C. 706 (reviewing court shall take "due account" of the "rule of prejudicial error"). Rather, the cases on which petitioners rely were factbound resolutions based on the application of legal principles that do not conflict

with those applied by the decision below.[3] Indeed, like other circuits, the Fifth Circuit has vacated and remanded cases on similar grounds. See, *e.g.*, *Newton*, 209 F.3d at 460 (remanding to the ALJ for further consideration after concluding that the ALJ "improperly rejected the opinions of [the claimant's] treating physician without contradictory evidence from physicians who had examined or treated [the claimant] and without request-

[3] See *Robinson*, 366 F.3d at 1083-1084 (remanding where the ALJ failed to give "any explanation" for how he assessed the weight of the treating physician's opinion, failed to seek additional information from that physician after the ALJ concluded that the physician's information was inadequate, and rejected the treating physician's opinion in favor of the opinion of a physician who had not examined the claimant); *O'Donnell* v. *Barnhart*, 318 F.3d 811, 816, 818 (8th Cir. 2003) (remanding for the ALJ to seek additional information from the treating physician where the ALJ gave "no weight" to the physician's opinion after finding that the physician's treatment notes were "conclusory," and where the claimant's treating physician had additional relevant information to submit); *Bowman* v. *Barnhart*, 310 F.3d 1080, 1085 (8th Cir. 2002) (remanding to the ALJ to seek additional information from the treating physician where the ALJ rejected the treating physician's opinion in favor of the opinion of a physician who had not examined the claimant); *Clark* v. *Commissioner of Soc. Sec.*, 143 F.3d 115, 118-119 (2d Cir. 1998) (remanding to the district court to reconsider the claimant's contention that the ALJ should have sought additional information from the treating physician before rejecting his opinion based on a lack of clinical or objective support in his records); *Goatcher* v. *United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (remanding where the ALJ gave "short shrift" to the treating physician's opinion and failed to give "specific, legitimate reasons" for doing so). See also *White*, 287 F.3d at 907-908 (holding that the ALJ did not err in rejecting the treating physician's opinion in favor of that of a consulting physician who had examined the claimant, noting that the ALJ gave good reasons for doing so, and holding that the ALJ did not err in failing to recontact the treating physician where the information that the treating physician provided was "not so incomplete that it could not be considered").

ing additional information from the treating physician"). The published decision in *Newton*, not the unpublished decision in this case, constitutes the relevant Fifth Circuit precedent on this issue. There is no reason to believe that the Fifth Circuit will not continue to vacate and remand when there are prejudicial procedural errors, just as it did in *Newton* and as other courts of appeals have done.

3. Finally, petitioners broadly assert (Pet. 5) that SSA routinely ignores the regulations relating to treating physicians. SSA processes literally millions of disability claims each year;[4] roughly 100,000 claims are resolved each year by the Appeals Council.[5] That errors occur in particular cases is regrettable, but inevitable as a practical matter. The Appeals Council sits to correct such errors and, as petitioners acknowledge, it has done so in cases with respect to the same types of errors alleged here. Pet. 18 ("Counsel for petitioners has obtained a number of remands from the Appeals Council for failure to comply with 20 CFR 404.1512(e)(1)."). In any event, as the magistrate judges' opinions in these cases make clear, there is substantial evidence demonstrating that petitioners were not disabled within the meaning of the Social Security Act.

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[4] See 70 Fed. Reg. 43,590 (2005) ("Currently, more than two and a half million individuals apply for Social Security and SSI benefits based on disability each year.").

[5] See SSA, *Annual Statistical Supplement, 2005* (Dec. 2005) <http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2005/2f8-2f11.html#table2.f11>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005